Courts' Treatment of N.C. CON Decisions Uncertain in Wake of Procedural Changes

11.28.2011
11.29.2011

Until now, in appeals challenging decisions by North Carolina's Certificate of Need (CON) agency to approve or deny CON applications, it has not been unusual for administrative law judges (ALJs) to find that the agency was wrong and recommend that its decision be reversed – only to have his or her recommendation rejected by the final agency decision maker in favor of the original agency decision. Now, imminent changes to North Carolina's administrative procedure statute may result in more reversals of CON decisions by removing the agency's ability to reject unfavorable decisions by ALJs. However, after the ALJ decides a case, the same procedural changes could alter the way in which the Court of Appeals reviews CON cases and increase the chance that the Court of Appeals will reverse and reinstate the original agency decision. As a result, these procedural changes may not ultimately improve the success rate of CON appeals, but may increase the number of cases appealed to the Court of Appeals.

Appeals of North Carolina State agency decisions (such as decisions on Certificate of Need Applications) are brought before the North Carolina Office of Administrative Hearings (OAH) and are governed by the North Carolina Administrative Procedure Act.[1] Currently, when a decision of the Certificate of Need Section (CON Section) is appealed, an ALJ in the OAH makes a "recommended decision" that is sent to the Division of Health Service Regulation (which includes the CON Section) for a "final agency decision."[2] If a party is dissatisfied with the final agency decision, it may appeal directly to the N.C. Court of Appeals.[3]

However, amendments to the Administrative Procedure Act passed in June 2011[4] will make numerous changes to the Administrative Procedure Act, including the elimination of the "final agency decision" as a procedural step. After the 2011 Amendments take effect in January 2012, the ALJ's decision will no longer be a *recommended* decision to the agency. Instead, the ALJ's decision will be a "final decision"[5] which will *not* be returned to the agency for review, but can instead be appealed directly to the Court of Appeals. The elimination of a "final agency decision" by the Division of Health Service Regulation is likely to increase the number of CON cases that are reversed at this first level of administrative appeal, since an ALJ's decision to reverse the CON Section cannot be overruled by the Division of Health Service Regulation.

However, this trend may not ultimately result in more reversals of CON decisions. After the procedural amendments take effect, the courts will have to determine the level of scrutiny these ALJ decisions are given, which may result in the Court

of Appeals giving less weight to final decisions by ALJs than is currently given to final agency decisions. "[T]here is a presumption that 'an administrative agency has properly performed its official duties.'[6] Accordingly, ALJs are required to give "due regard to the demonstrated knowledge and expertise" of the agency.[7] Similarly, on appeal to the courts, an argument that the CON Section was wrong in deciding whether an application conformed with the review criteria is generally subject to the "whole record test."[8] Under this test, the Court of Appeals "should not replace the agency's judgment as between two reasonably conflicting views, even if [it] might have reached a different result if the matter were before [it] *de novo*."[9] Instead, "a court must . . . [only] determine whether there is substantial evidence to justify the agency's decision."[10]

The recent changes to the Administrative Procedure Act will result in final decisions being made, *not* by the agency with the specific charge and subject matter expertise, but instead by generalist ALJs in the Office of Administrative Hearings. Accordingly, in cases where an ALJ reverses the CON Section on technical, fact-intensive issues within the CON Section's discretion, the Court of Appeals may simply determine that the ALJ failed to give due regard to the CON Section's knowledge and expertise. The Court of Appeals could then disregard the ALJ's final decision and instead defer to the initial CON Section decision.

Therefore, in cases where an ALJ reverses a decision of the CON Section, the CON Section itself[11] or an approved applicant for a CON would have a strong incentive to appeal the ALJ's final decision in the hope that the Court of Appeals would defer to the CON Section's original decision. Only time will tell how the procedural changes will affect CON reviews. Ultimately, the net effect of the amendments may not significantly change the chance of success in overturning a CON Section decision, but in many cases it may extend the litigation and result in more cases being resolved by the Court of Appeals.

[1] *See* N.C. Gen. Stat. Ch. 150B, Article 3.

[2] N.C. Gen. Stat. § 150B-34 (2011).

[3] N.C. Gen. Stat. § 131E-188(b) (2011) .

[4] 2011 N.C. Sess. Laws 398 (see http://www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2011-2012/SL2011-398.html).

[5] 2011 N.C. Sess.Laws 398, § 18 (amendments to N.C. Gen. Stat. § 150B-34).

[6] *E. Carolina Internal Med. v. N.C. Dep't of Health & Human Servs.*, No. COA09-1278, 2011 N.C. App. LEXIS 828, at *24, (N.C. App. May 5, 2011) (citing *In re Community Assoc'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980)).

[7] N.C. Gen. Stat. § 150B-34(a).

[8] *E. Carolina*, 2011 N.C. App. LEXIS 828 at*37-38, (citing *Dialysis Care of N.C. v. N,.C. Dep't of Health & Human Serv.*, 189 N.C. App. 534, 543, 659 S.E.2d 456, 462, *aff'd per curiam*, 362 N.C. 504, 666 S.E.2d 749 (2008)).

[9] *Craven Regional Medical Authority v. N.C. Dep't of Health & Human Servs.*, 176 N.C. App. 46, 625 S.E.2d 837 (2006)

[10] *Good Hope Health Sys. v. Dep't of Health & Human Servs.*, 189 N.C. App. 534, 543, 659 S.E.2d 456, 462 (2008) (quoting *Watkins v. N.C. State Bd. Of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004)).

[11] Among other procedural changes, the agency itself will be allowed to appeal final decisions, which it cannot do under the current Administrative Procedure Act. (*see* http://www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2011-2012/SL2011-398.html).

For more information about this topic, please contact the author or any member of the Williams Mullen Long Term Care Industry Service Group.

Please note:

This newsletter contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel. For more information, please visit our website at www.williamsmullen.com or contact Joel R. Nied, 757.473.5342 or jnied@williamsmullen.com. For mailing list inquiries or to be removed from this mailing list, please contact Julie Layne at jlayne@williamsmullen.com or 804.420.6311.

Related People

Related Services

- Health Care Litigation
- Senior Housing Transactions
- Long-Term Care Facilities Litigation
- Health Care